INDEX

Appellants' Brief in Opposition to Motions of Appellees to Dismiss or Affirm

	Page
Nature of the Case	2
Summary of Argument	4
Argument	7
I. *Aircraft & Diesel Equipment Corp. v. Hirsch, et al.* Does Not Apply to the Case at Bar	7
II. Exhaustion of Administrative Remedy Does Not Apply	9
A. *Macauley v. Waterman Steamship* does not apply to the case at bar	10
B. *Myers v. Bethlehem Steel Corporation* distinguished from the case at bar	12
C. Presence of an election of remedies	15
D. Inherent constitutional defects appearing on the faces of the statutes	15
E. Appellees acted in excess of powers; so *Skinner & Eddy Corporation v. United States, et al.* (1919), 249 U. S. 557 is controlling	28
F. Theory for exhausting administrative remedies is not applicable herein	29
III. The Remedy at Law Is Inadequate	31
A. Equity will restrain even though a law stating that no injunction shall issue	36
B. The requisites of equity jurisdiction are present	37
IV. This Suit Is Not One Against United States	38
Conclusion	41
Appendix (Rule 64 of the Tax Court)	42

TABLE OF AUTHORITIES

	Page
Aircraft & Diesel Equipment Corporation v. Hirsch et al., No. 95, this term	4, 7, 8, 41
Alabama Power Co. v. Ickes, 302 U. S. 464	37
Allen v. Regents, 304 U. S. 439	36
Anniston Manufacturing Co. v. Davis, 301 U. S. 337	16, 19
Baltimore & Ohio R. Co. v. United States, 298 U. S. 349	20
Beaumont, S. L. & W. R. Co. v. United States, 282 U. S. 74	20, 31
Blodgett v. Holden, 275 U. S. 142	22
California v. Latimer, 305 U. S. 255	36
Carolina Glass Co. v. State of S. Carolina & Carolina Glass Co. v. State Dispensary Comm., 87 S. C. 270, 69 S. E. 391	17
Carolina Glass Co. v. State of S. Carolina & Carolina Glass Co. v. Murray et al., 240 U. S. 305	17
Carter v. Carter Coal Co. et al., 298 U. S. 238	16
Champlin Refining Co. v. Corporation Commission, 286 U. S. 210	22
Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418	16
Coffman v. Breeze Corporations, Inc. et al., 323 U. S. 316	37
Cohen v. Secretary of War, Docket No. 27-R, 7 T. C. No. 118, decided October 22, 1946	25
Compania General De Tobaccos v. Collector, 275 U. S. 87	18
Connally v. General Construction Co., 269 U. S. 385	22
Den ex dem. Murray v. Hoboken Land & Improvement Co., 18 How. (59 U. S.) 272	17, 20
Ettor v. Tacoma, 228 U. S. 148	22
Ex parte Young, 209 U. S. 123	40
Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134	19

	Page
Forbes et al. v. Board of Commissioners, 258 U. S. 338	22
Ickes v. Fox, 300 U. S. 82	39
Jones v. Securities & Exchange Commission, 298 U. S. 1	17, 32
Kilbourn v. Thompson, 103 U. S. 168	17
Los Angeles Gas & Electric Corp. v. Railroad Commission of Calif., 289 U. S. 287	20
Macauley v. Waterman Steamship Corporation, No. 435, October term, decided March 25, 1946	4, 10, 11, 12
Miller v. Standard Nut Margarine Co., 284 U. S. 498	36
Mine Safety Appliances Company v. Forrestal, 326 U. S. 371	38, 39
Monongahela Navigation Co. v. United States, 148 U. S. 312	19
Myers v. Bethlehem Steel Corp., 303 U. S. 41	4, 10, 12, 13, 14
Nichols v. Coolidge, 274 U. S. 531	22
Ochoa v. Hernandez, 230 U. S. 139	22
Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287	16
Pacific Telephone & Telegraph Co. v. Kuykendall, 265 U. S. 196	31
Palmetto Fire Insurance Co. v. Conn., 272 U. S. 295	18
Panama Refining Co. v. Ryan, 293 U. S. 388	17
Parsons et al. v. Russell et al., 11 Mich. 113	20
Pennsylvania v. West Virginia, 262 U. S. 553	16
Pennsylvania Coal Co. v. Mahon et al., 260 U. S. 393	18
Petroleum Exploration Inc. v. Public Service Commission, 304 U. S. 209	36, 37
Philadelphia Co. v. Stimson, 223 U. S. 605	39
Pierce v. Society of Sisters, 268 U. S. 510	16
Porter, Auditor v. Investors Syndicate, 286 U. S. 479	31
Richmond, F. & P. R. Co. v. McCarl, 62 F. (2d) 203	18
Schechter Poultry Corp. v. United States, 295 U. S. 495	17

Page

Skinner & Eddy Corporation v. United States et al., 249 U. S. 557 ..... 5, 28-29
Small Co. v. American Sugar Refining Co., 267 U. S. 233 22
Springer v. Philippine Islands, 277 U. S. 189 17
Tax Court Rule 64, Appendix 42-44
Tennessee Electric Power Company, et al. v. Tennessee Valley Authority et al., 306 U. S. 118 ..... 37, 40
Texas & P. R. Company v. Abilene Cotton Oil Company, 204 U. S. 426 29
United States v. Abilene & S. R. Co., 265 U. S. 274 ... 30
United States v. Blair, 321 U. S. 730 33
United States v. Cohen Grocery Co., 255 U. S. 81 22
Vallat v. Radium Dial Company, 360 Ill. 407, 196 N. E. 485 22
Village of Euclid et al. v. Ambler Realty Co., 272 U. S. 365 16
Vom Baur, Federal Administrative Law, Section 233 30
Waite et al. v. Macy et al., 246 U. S. 606 25
Wolf Packing Co. v. Court of Industrial Relations, 262 U. S. 522 18
Yakus v. United States, 321 U. S. 414 16

United States of America

In the

Supreme Court of the United States

OCTOBER TERM, 1946

No. ....

RAYMOND E. WADE, et al., d/b/a CADILLAC TOOL & DIE COMPANY and WAYNE DIE & ENGINEERING COMPANY,
Appellants,
vs.
HENRY L. STIMSON, et al.,
Appellees

Appeal from the District Court of the United States for the District of Columbia

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BRIEF IN OPPOSITION TO MOTIONS OF APPELLEES TO DISMISS OR AFFIRM

The appellants pursuant to paragraph 3 Rule 7 of the Rules of this Court file this their Brief in Opposition to the Motions of Appellees to Dismiss or Affirm. The opinion of the Three-Judge Statutory Court, convened pursuant to Title 28 of U. S. C. Section 380 (a), is reported at 65 F. Supp. 277.

NATURE OF THE CASE

The appellants filed a complaint in the District Court of the United States for the District of Columbia. The complaint filed herein challenges the constitutional validity of the following enactments:

1. Section 403 of the Sixth Supplemental Defense Appropriation Act, 1942 (Public 528, 77th Congress), Approved April 28, 1942, 56 U. S. Statutes at Large 245;

2. Section 801 of the Revenue Act of 1942 (Public 753, 77th Congress), Approved October 21, 1942, 56 U. S. Statutes at Large 982; and

3. Sections 403 (e) (1) and (2) of Section 701 (b) of the Revenue Act of 1943, (Public 235, 78th Congress), Enacted February 25, 1944, 58 U. S. Statutes at Large 78.

The complaint also challenges the unauthorized actions of the appellees and the actions in excess of authority by appellees in deviation and in violation of the aforesaid enactments of April 28, 1942 and October 21, 1942.

The complaint contains among other allegations that the appellants are partners engaged in the precision manufacture of tools, dies, jigs, and fixtures in Detroit, Michigan at two locations under the firm names of Cadillac Tool & Die Company and Wayne Die & Engineering Company. The appellants did not have contracts with the Government of the United States, but entered into contracts for particular tools, dies, jigs, and fixtures with their customers. The appellees purported to "renegotiate" the appellants. Pursuant to the purported "renegotiation" the appellees entered a unilateral determination against the Cadillac Tool & Die Company in the amount of $215,000.00 and entered a unilateral determination against the Wayne Die & Engineering Company in the amount of

$230,000.00. The appellants averred that the unilateral determinations issued by the appellees are in excess of the authority conferred upon them by the enactments of April 28, 1942 and of October 21, 1942. Thereafter, the appellees issued withholding orders or directives to the customers of the appellants instructing said customers to withhold from the said appellants a sum up to $445,000.00 and to hold said sum of money for and on behalf of the United States. The appellants averred that the withholding orders or directives issued by the appellees to the customers of the appellants are in excess of the authority conferred upon appellees by the enactments of April 28, 1942 and of October 21, 1942.

At the time that the appellants filed their complaint, they only had knowledge of withholding orders outstanding to customers in the amount of $255,000.00, but in truth and in fact the appellees issued withholding orders totalling $445,000.00 to the customers of the appellants. In the complaint, the appellants sought the aid of equity and in the prayer, among others, the appellants prayed that they "may have such other and further relief as may be agreeable to equity and good conscience." Thereafter, the appellants filed a Motion for Interlocutory Injunction seeking to restrain the appellees from issuing any further withholding directives to the customers of the appellants and proceeding in any manner to enforce or to attempt to enforce the unilateral determinations entered on September 13, 1944 or to continue in effect the withholding directives or orders issued to the customers of the appellants. The appellees filed Motions to Dismiss the Complaint and for Summary Judgment. A Three -Judge Statutory Court was convened pursuant to the Act of August 24, 1937, Title 28 U. S. C. 380 (a). In the meanwhile, the appellees did not maintain the status quo, but ignored the complaint that had been served upon them and ignored the appellants'

Motion for Interlocutory Injunction and seized from the customers of the appellants a sum of $2,478.56.

The Three-Judge Statutory Court rendered its opinion, 65 F. Supp. 277, on April 10, 1946 holding:

> "The motion of the defendants for a summary judgment, there being no material issues of fact, will be sustained."

SUMMARY OF ARGUMENT

I. Aircraft & Diesel Equipment Corp. v. Hirsch et al. does not apply to the case at bar.

The case of *Aircraft & Diesel Equipment Corp. v. Hirsch et al.*, No. 95, this term of the Supreme Court does not govern the matter herein. The consideration and decision by the Court of the *Aircraft & Diesel* case will not decide or dispose of the matter at bar.

The Motions of the appellees to dismiss or affirm are not well taken:

II. Exhaustion of administrative remedy does not apply.

A. *Macauley v. Waterman Steamship Company* does not apply, for among other reasons, the company was not confronted with withholding directives or orders;

B. *Myers v. Bethlehem Steel Corporation* is distinguished from the matter herein since in that case only a question of "coverage" was involved and since the statute in that case provided an administrative scheme or procedure meeting the requirements of due process and also provided for judicial review. In that case no enforcement could be made by the Board without a Court proceeding. This action challenges the statutes as being repugnant to the Constitution and as failing to provide a valid statutory

scheme pursuant to due process of law. The statutes dispense with judicial proceedings entirely;

C. The enactment of February 25, 1944, Section 403 (e) (2) for the year 1942 gives an election of remedies rather than a mandatory proceeding in the Tax Court of the United States;

D. *Inherent constitutional defects appearing on the faces of the statutes* eliminate the need to exhaust the administrative remedy;

E. *Appellees acted in excess of powers* conferred upon them; so their action is void and it is not necessary to exhaust the administrative remedy; *Skinner & Eddy Corporation v. United States, et al.* (1919), 249 U. S. 557 is controlling; and

F. The theory for exhausting administrative remedies is not applicable herein since there is no uniform determination by experts.

III. The remedy at law is inadequate for the reasons that:

1. Appellants cannot maintain suit in the Court of Claims;

2. Appellants cannot maintain suit under the Tucker Act;

3. Appellants cannot recover damages from appellees;

4. Appellants should not be obliged to sit by and wait to be sued and then attempt to make a defense, but must have right to maintain an affirmative suit;

5. Action against appellants' customers is not a clear, practical, or efficient remedy;

6. Appellants cannot sue the United States;

7. There is circuity of actions without determination of tax credit pursuant to Section 3806 of the Internal Revenue Code;

8. Appellants cannot stop withholding orders or directives;

9. Appellants cannot get money back which appellees have seized and put into the Treasury; and

10. The Tax Court remedy is inadequate.

A. *Equity will restrain even though a law stating that no injunction shall issue;* and

B. *The requisites of equity jurisdiction are present* since there is an invasion of a property right and the presence of irreparable injury without any legal remedy.

IV. This suit is not one against the United States.

This is an action to prevent the taking by the appellees, under color of statutes which the appellants assert are unconstitutional, of the appellants' property. The invalidity of the statute strips the appellees of their power and they stand before the Court in their private and their individual capacities.

ARGUMENT

I.

AIRCRAFT & DIESEL EQUIPMENT CORP. v. HIRSCH, ET AL., DOES NOT APPLY TO THE CASE AT BAR

Appellees contend that *Aircraft & Diesel Equipment Corp. v. Hirsch, et al.*, No. 95, now pending before this Court involves substantially the same jurisdictional questions as the case at bar. Appellees further contend that the *Aircraft & Diesel* case if affirmed by this Court will dispose of the appeal herein. Appellants submit that the Court's disposition of the *Aircraft and Diesel* case will not govern the case at bar. Therefore this case should be considered by the Court, and should not be held in abeyance as requested by the appellees.

The differences between the *Aircraft & Diesel* case and the case at bar are readily apparent from the opinions of the Three-Judge Statutory Court:

1. In the *Aircraft & Diesel* case, the complaint states that Aircraft and Diesel had contractual relations with the United States. In the case at bar the complaint avers that there were no contractual relations with the United States.

2. The alleged "renegotiation" in the *Aircraft & Diesel* case covers the fiscal year ending November 30, 1943. In the case at bar, the alleged renegotiation is for the period ending December 31, 1942.

3. In the *Aircraft & Diesel* case, the defendants are Henry L. Stimson and Robert P. Patterson and the various members of the War Contracts Price Adjustment Board. In the case at bar the defendants are Henry L. Stimson and Robert P. Patterson— the War Contracts

Price Adjustment Board was not created until February 25, 1944 by the enactment of Section 701 (b) of the Revenue Act of 1943 (Public 235, 78th Congress), and this War Contracts Price Adjustment Board had nothing whatsoever to do with the alleged "renegotiation" of the Cadillac and the Wayne Companies. Furthermore, *Aircraft & Diesel* was "renegotiated" under the enactment of February 25, 1944, but Cadillac & Wayne were "renegotiated" under the enactments of April 28, 1942 and of October 21, 1942.

4. In the *Aircraft & Diesel* case, no withholding orders or directives were issued to the customers of the Aircraft & Diesel Corporation—there was fear and apprehension that such orders would be issued. However, in the case at bar, withholding orders or directives were issued to the customers by the appellees in the amount of $445,000.00.

5. In the *Aircraft & Diesel* case, the complaint attacks the validity of the enactment of April 28, 1942 and the validity of the enactment of February 25, 1944. In the case at bar, the complaint attacks the validity of the enactment of April 28, 1942 and the enactment of October 21, 1942 and Section 403(e) (1) and (2) of the enactment of February 25, 1944. The *Aircraft & Diesel* case is within the purview of the enactment of February 25, 1944 because the fiscal year of the company ends after June 30, 1943, but the question then arises whether or not *Aircraft & Diesel* can properly make an attack on the validity of the enactment of April 28, 1942. The case at bar is definitely not within the purview of the enactment of February 25, 1944 since the fiscal year involved occurred before June 30, 1943—namely, the fiscal year ending December 31, 1942.

II.

EXHAUSTION OF ADMINISTRATIVE REMEDY DOES NOT APPLY

Appellants have filed with the Tax Court of the United States two petitions. One is in the name of the Cadillac Tool & Die Company and the other is in the name of the Wayne Die & Engineering Company in which the appellants herein petition the Tax Court for a redetermination pursuant to Section 403 (e) (1) (2) of the enactment of February 25, 1944, specifically described as Section 701 (b) of the Revenue Acts of 1943 (Public 235, 78th Congress), enacted February 25, 1944.

While a general rule in administrative procedure has developed to the effect that a party must exhaust administrative remedies, there are, of course, exceptions to the rule—that is, a party need not resort to further administrative remedies when the same fails to comply with the requirements of due process or when the enactment itself does not provide for due process of law. The statutory scheme enacted April 28, 1942 and enacted October 21, 1942 must be examined in order to determine whether there are valid statutory schemes compatible with due process and whether the administrative remedies therein render due process of law. Subsequently on February 25, 1944, Congress retroactively enacted Section 403 (e) (1) and (2), a possible further procedure in the Tax Court of the United States.

A. Macauley v. Waterman Steamship does not apply to the case at bar.

The appellees rely on the case of *Macauley v. Waterman Steamship Corporation* (1946) No. 435, October term, decided March 25, 1946.

The appellants submit to the Court that the *Waterman Steamship* case is not controlling in the matter at bar. The *Waterman Steamship* case started in the District Court in the District of Columbia on the complaint of the Waterman Steamship Corporation seeking an injunction and declaratory judgment. The lower Court dismissed the complaint, but was reversed by the United States Court of Appeals for the District of Columbia. The United States Supreme Court reversed the Court of Appeals on the strength of *Myers v. Bethlehem Steel Corporation* (1938), 303 U. S. 41.

The matter at bar is readily distinguished from the decision of this Court in the *Waterman Steamship* case:

1. Withholding orders or directives have been issued by the appellees to the customers of the appellants in an amount of $445,000.00 and the appellants have suffered and are suffering irreparable injury while in the *Waterman Steamship* case the alleged "renegotiation" process is just starting.

2. In the *Waterman Steamship* case a contention was presented that the contracts of the Waterman Steamship Corporation were not within the purview of the Renegotiation Act. The Waterman Steamship Corporation did not contend that the enactment of April 28, 1942 and the enactment of October 21, 1942 had inherent constitutional defects on their faces and that as a result it was not necessary to follow the procedure, if any, provided by

the statutes since on the faces there was a lack of due process of law. The case at bar raises the question of inherent constitutional defects on the faces of the enactments of April 28, 1942 and October 21, 1942 and also inherent constitutional defects on the face of Section 403 (e) (1) and (2) enacted February 25, 1944.

3. The issue in the *Waterman* case is one of "coverage." The Court stated that "coverage" cannot in the first instance be decided by the District Court. In the matter at bar, "coverage" is only one of the many problems. Appellants submit to the Court that the question of "coverage" will not be decided even though the Supreme Court stated in the *Waterman* opinion that the Tax Court has: "* * * the power to decide questions of coverage * * *" The question of "coverage" has been eliminated entirely by the Tax Court of the United States by its promulgation of Tax Court Rule 64 which is hereinafter set forth at length in an appendix and which the appellants ask the Court to consider by virtue of the doctrine of judicial notice. It is submitted that in order for any petitioner to qualify by filing a petition in the Tax Court, the petitioner must satisfy the requirements of Rule 64; if the petitioner does, then it makes a waiver of "coverage." If the petitioner insists upon getting an answer to the question of "coverage," the petitioner has not satisfied the requirements of Rule 64 and the Tax Court does not have jurisdiction.

4. The appellants herein have filed as aforesaid two petitions in the Tax Court of the United States seeking a *de novo* determination. The appellants are confronted in the Tax Court with the same problem of "coverage" that confronted the Waterman Steamship Corporation. The appellants have so worded their petitions to the Tax Court that they have preserved to themselves the right to with-

draw from the Tax Court of the United States in the event that the appellants, the petitioners in the Tax Court, cannot obtain a full and complete hearing on the question of "coverage" and all questions of law as well as on the fact questions. Nevertheless, the appellants, the petitioners in the Tax Court, have been forced by virtue of Tax Court Rule 64 to so file the petitions, the appellants submit to this Court that there is a grave and serious question as to whether or not a waiver of the question of "coverage" was made.

B. Myers v. Bethlehem Steel Corporation distinguished from the case at bar.

The *Waterman Steamship* case was decided by the District Court by relying on the case of *Myers v. Bethlehem Steel Corporation* (1938), 303 U. S. 41 and this Court agreed with the District Court and also relied on the *Myers v. Bethlehem Steel Corporation* case. The *Myers* case, it is submitted by the appellants, is not controlling in the matter herein. The *Myers* case involved a question of "coverage;" the matter at bar involves the invasion of appellants' property by the appellees. The *Myers* case is further distinguished from this case by what the Court stated on page 47:

> "There is no claim by the Corporation that the statutory provisions and the rules of procedure prescribed for such hearings are illegal; or that the corporation was not accorded an ample opportunity to answer the complaint of the Board; or that opportunity to introduce evidence on the allegations made will be denied * * *."

In the matter at bar the appellants challenge the statutory enactments as being invalid and unconstitutional and that these enactments do not prescribe any procedure. In

the matter at bar, the appellants submit that they did not have a hearing before the appellees—the appellants did not have a complaint to answer and did not know what the issues were and were not permitted to introduce any evidence on any allegations made by the appellees. In the *Myers* case exclusive power was granted to the National Labor Relations Board: "to prevent any person from engaging in any unfair practice affecting commerce." The appellants submit that not any or all grants of exclusive power are constitutional, but that to have a valid grant of exclusive power in any Board there must be a fair statutory procedure and appropriate judicial review. The enactments of April 28, 1942 and of October 21, 1942 do not provide for a proper statutory scheme of procedure and it is submitted that Section 403 (e) (1) and (2) of the enactment of February 25, 1944 denies judicial review;

Section 403 (e) (1):

> "* * * Upon such filing such Court shall have exclusive jurisdiction by order, to finally determine the amount, if any, of such excessive profits received or accrued * * * and such determination shall not be reviewed or redetermined by any Court or agency. * * *"

In order to have a valid exclusive grant of power, the Court stated the requisite as follows in the *Myers* case, p. 48:

> "The grant of that exclusive power is constitutional, because the act provided for appropriate procedure before the Board and in the review by the Circuit Court of Appeals an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board. No power to enforce an order is conferred upon the Board. To secure enforcement the Board must apply to a Circuit Court of Appeals for its affirmance."

The appellants submit that this should be contrasted with the withholding orders or directives that have been issued to the customers of the appellants by the appellees—thus the appellees exercise a power of enforcement which is summary, *ex parte,* and without any legal proceedings whatsoever. In the *Myers* case the Court concluded that the Corporation could not be hurt, for there could be no enforcement without seeking the aid of a Court; but in the matter at bar the appellees need not seek the aid of any Court to take the property of the appellants.

In the *Myers* case, the Corporation contended that commerce was not involved—clearly a question of "coverage," and the Corporation further contended that it would suffer irreparable injury to follow the administrative process outlined by the National Labor Relations Act. For these reasons the Corporation asked that an injunction be granted restraining the enforcement of the Act. However, this Court answered these contentions, page 50:

> "• • • The contention is at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. That rule has been repeatedly acted on in cases where, as here, the contention is made that the administrative body lacked power over the subject matter."

The appellants submit that the Court in the *Myers* case merely determine that it is necessary to exhaust a prescribed administrative remedy when the question is one of "coverage." Appellants further submit that the matter at bar is within the purview of the two previous quotations from the *Myers* case and the issue here is not limited to "coverage."

C. Presence of an Election of Remedies.

The appellants submit to the Court that Section 403 (e) (1) (2) enacted February 25, 1944 provides that a petition "may" be filed if the year involved is 1942. The language of the enactment is not mandatory. The appellants submit to the Court that it may be determined that the proceedings before the Tax Court are judicial in nature and within the purview of Sections 1 and 2 of Article 3 of the Constitution. In that event the remedy of the Tax Court is not administrative and the appellants should have their choice and be allowed to make an election. It may also be determined that the proceedings in the Tax Court are purely administrative, then in that event the Tax Court offers an administrative or a legislative remedy and it is not necessary to exhaust that remedy for lack of due process on the face of the enactments and on the face of Tax Court Rule 64.

D. Inherent Constitutional defects appearing on the faces of the statutes.

The enactment of April 28, 1942 and the enactment of October 21, 1942 are inherently unconstitutional on their faces and do not provide for a valid statutory plan of procedure that meets the requirements of due process of law; consequently appellants submit it is not necessary to exhaust the administrative remedy or remedies. Appellants further submit that the inherent constitutional defects on the faces of the statutes place impossible conditions on the appellants from the standpoint of administrative procedure. Appellants therefore contend it is not necessary to resort to the administrative remedy, but they may pursue a remedy or remedies in this Court and attack the statute as unconstitutional.

Anniston Manufacturing Company v. Davis (1937), 301 U. S. 337;

Village of Euclid, et al. v. Ambler Realty Company, (1926), 272 U. S. 365;

Pennsylvania v. West Virginia (1923), 262 U. S. 553;

Pierce v. Society of Sisters (1924), 268 U. S. 510;

Carter v. The Carter Coal Company (1936), 298 U. S. 238.

As recently as in the case of *Yakus v. United States* (1944), 321 U. S. 414, the Supreme Court said on page 435:

> "Only if we could say in advance of resort to the statutory procedure that it is incapable of affording due process to petitioners could we conclude that they have shown any legal excuse for their failure to resort to it or that their constitutional rights have been or will be infringed."

The inherent constitutional defects, among others, are:

1. There is no provision for judicial review. On February 25, 1944 a proceeding was created retroactively in the Tax Court which purports to be final, thus making a denial of judicial review:

> 403 (e) (1). "• • • Upon such filing such Court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued • • • and such determination shall not be reviewed or redetermined by any Court or agency."

Ohio Valley Water Co. v. Ben Avon Borough (1920), 253 U. S. 287;

Chicago, Milwaukee & St. Paul R. R. Co. v. Minnesota (1890), 134 U. S. 418.

2. The enactments ignore and violate the doctrine of supremacy of law and in place and instead create executive determination without limitation, definition or standard and thereafter executive enforcement in an *ex parte* and summary manner.

Jones v. Securities & Exchange Commission (1936), 298 U. S. 1.

3. The enactments ignore and violate the doctrine of separation of powers and in place and instead eliminate the judicial function and concentrate government in the hands of the executive department.

Springer v. Philippine Islands (1928), 277 U. S. 189;

Kilbourn v. Thompson (1880), 103 U. S. 168.

4. The enactments ignore and violate the doctrine that an indebtedness cannot be created or enforced without legal process within the purview of Article 3, Sections 1 and 2 and of the Fifth Amendment.

Den ex dem Murray v. Hoboken Land and Improvement Company (1856), 18 Howard, (59 U. S.) 272;

Carolina Glass Company v. State of South Carolina et al., (1910), 87 S. C. 270, 69 S. E. 391 and (1916), 240 U. S. 305.

5. The enactments ignore and violate Article 1, Section 1 of the Constitution. An improper and invalid delegation of legislative power is made in the enactments.

Panama Refining Co. v. Ryan (1935), 293 U. S. 388;

Schechter Poultry Corp. v. United States (1935), 295 U. S. 495.

6. The enactments ignore and violate Article 1, Section 1 of the Constitution by improperly providing for invalid delegation, redelegation, subdelegation, and successive subdelegations of legislative powers.

7. The enactments ignore and violate Article 1, Section 8, Clause 1 of the Constitution, for in substance and in operation the enactments of April 28, 1942 and October 21, 1942 are taxing statutes without adhering to the constitutional requirements limiting a taxing act.

8. The enactments ignore and violate Article 3, Sections 1 and 2 of the Constitution of the United States by eliminating the judicial function and by enforcing a claimed indebtedness in an arbitrary, *ex parte* and summary manner without legal process or due process of law.

Richmond, F. & P. R. Co. v. McCarl (1932), 62 F. (2d) 203.

9. The enactments ignore and violate the Fifth Amendment from the standpoint of substance by depriving the appellants of life, liberty or property without due process of law. The enactments discriminate between those similarly situated. The enactments make an unreasonable classification claiming a concept of "total war," but operating on limited citizens instead of all equally. The enactments illegally empower the appellees so that the appellees select and elect those subject to the enactments according to unfettered whim and fancy without rules, standards, or any limitations whatsoever.

Pennsylvania Coal Co. v. Mahon (1922), 260 U. S. 393;

Wolf Packing Co. v. Court of Industrial Relations (1923), 262 U. S. 522;

Palmetto Fire Insurance Co. v. Conn. (1926), 272 U. S. 295;

Compania General De Tobaccos v. Collector (1927), 275 U. S. 87.

10. The enactments ignore and violate the Fifth Amendment of the Constitution by depriving the appellants of life, liberty or property without due process of law from the standpoint of procedure. The enactments do not provide a valid statutory administrative scheme or plan or plans within the purview of the Fifth Amendment. The enactments do not provide for a hearing, pleadings, formation of issues, introduction of evidence, right of cross-examination, right of confrontation, a record, findings of facts both basic and ultimate, and the right to know and to meet opposing claims. The enactments allow the appellees free reign in form and in substance and in effect to dispense with any and all administrative procedure and the safeguards thereof. The enactments do not set forth any administrative procedure and the entire process of "renegotiation" depends on the arbitrary will and the arbitrary procedure of the appellees.

Federal Communications Commission v. Pottsville Broadcasting Co. (1940), 309 U. S. 134.
Anniston Manufacturing Co. v. Davis (1937), 301 U. S. 337;

11. The enactments violate and ignore the Fifth Amendment of the Constitution in that the executive is taking the property of the appellants for public use without just compensation.

It is not for the legislature or the executive to determine what shall be the measure of compensation for the taking of private property for public use—that is a judicial question and must be decided within the purview of Article 3, Sections 1 and 2 of the Constitution. The authorities are uniform.

Monongahela Navigation Company v. United States (1892), 148 U. S. 312;

Beaumont, Sour Lake and Western Railway Company v. United States, et al., (1930), 282 U. S. 74;

Los Angeles Gas & Electric Corp. v. R. R. Commission (1933), 289 U. S. 287;

Baltimore & Ohio R. R. Company v. United States (1936), 298 U. S. 349.

12. The enactments violate and ignore the Fifth Amendment of the Constitution in that witholding orders or directives are issued to the customers of the appellants without any hearing or any due process or any final adjudication on the basis of an *ex parte*, summary determination and without allowing to the appellants a day in Court at any time as to the sums so taken.

Parsons et al. v. Russell et al., (1863), 11 Mich. 113;

Den ex dem Murray v. Hoboken Land & Improvement Co. (1856), 18 How. (59 U. S. 272).

The enactment of April 28, 1942 provided in subsection (c) (2):

> "to withhold from the contractor or subcontractor any amount of the contract price which is found as a result of such renegotiation to represent excessive profits, and * * *"

The enactment of October 21, 1942 provides in subsection (c) (2):

> "Upon renegotiation, the Secretary is authorized and directed to eliminate any excessive profits under such contract or subcontract * * * (iii) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to the subcontractor, any amount of such excessive profits under subcontract;"

13. The enactments ignore and violate the Seventh Amendment of the Constitution since an indebtedness is created by an executive fiat in an amount in excess of $20.00 depriving the appellants of their right to a jury trial.

14. The enactments ignore and violate the Tenth Amendment of the Constitution. Prices are set on the products of appellants by indirection and by allowing the appellees to invade the reserve powers belonging to the respective states contrary to the fundamental conception of the federal government as being one of delegated powers. The federal government is one of delegated powers and can only exercise the powers delegated to it by the Constitution. Neither can the federal government do indirectly that which will disregard and nullify the dual form of government existing between the federal government and the various states as set forth in the Constitution of the United States.

15. The enactments do not provide for prospective legislation informing the citizen of his right and his duty in language which is understandable, and in language which spells out rights, liabilities, and duties; instead the enactments are indefinite, vague and uncertain and do not prescribe rules for future conduct. Each of the enactments is an uncertain and vague patch-work piece of legislation applied retroactively by appellees: the one of April 28, 1942 according to the legislative history of this enactment provides for renegotiation that is entirely voluntary on the part of the entity being "renegotiated" and for renegotiation which would be a valid, uncoerced agreement between the appellees and the entity which is the other party; the enactment of October 21, 1942 represents a broadening of the appellees' powers; and the enactment of February 25, 1944, specifically Section 403 (e) (1) (2) is

the legislative-executive attempt to retroactively create some type of proceeding in the Tax Court.

United States v. L. Cohen Grocery Company (1921), 255, U. S. 81;
Small Company v. American Sugar Refining Company (1925), 267 U. S. 233;
Connally v. General Construction Company (1926), 269 U. S. 385;
Champlin Refining Company v. Corporation Commission of Oklahoma (1932), 286 U. S. 210;
Vallat v. Radium Dial Company, 360 Ill. 407, 196 N. E. 485.

16. The enactments ignore and violate vested rights. The enactments operate retroactively without any reasonable basis and by virtue of such retroactive operation property rights are destroyed retroactively.

Ettor v. Tacoma (1922), 228 U. S. 148;
Ochoa v. Hernandez (1912), 230 U. S. 139;
Forbes et al. v. Board of Commissioners (1921), 238 U. S. 338;
Nichols v. Coolidge (1927), 274 U. S. 531;
Blodgett v. Holden (1927), 275 U. S. 142.

17. The appellants respectfully direct the Court's attention to some of the glaring deviations from and violations of constitutional requisites and standards contained in the enactment of April 28, 1942:

> (a) Section 403 (a) "* * * the terms 'renegotiate' and 'renegotiation' include the refixing by the Secretary of the Department of the contract price."

A contract is a mutual agreement between two parties able to contract; so the terms thereof can only be changed by the mutual consent of the parties. If the Secretary can act alone, there is an elimination of the contract and there

is a confiscation of the same on the face of the statute. If the other party to the contract, the appellants, do not have an opportunity to seek legal redress in the Courts, there is an elimination of the judicial power and an exertion of the executive power.

(b) Section 403 (a) does not define the terms "subcontract" or "subcontractor."

(c) Section 403 (c) creates arbitrary, complete, and unstandardized power in the Secretary without any limitation or definition:

"* * * whenever in his opinion excessive profits have been realized, or are likely to be realized, * * *"

This provision violates Article 1, Section 1 of the Constitution and the appellants suggest that this provision should be compared with the tax law—the excess profits tax as set forth in Section 710-784 of the Internal Revenue Code which covers approximately 75 pages.

(d) Section 403 (c) provides for a withholding limited to unpaid contracts with the government of the United States:

"(2) To withhold from the contractor or subcontractor any amount of the contract price which is found as a result of such renegotiation to represent excessive profits,"

(e) Section 403 (c) also provides:

"Such contractor or subcontractor shall be deemed to be indebted to the United States for any amount which such Secretary is authorized to recover from such contractor or subcontractor under this subsection, * * *"

An indebtedness cannot be created in this manner.

(f) Section 403 (c) further provides:

> "• • • shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, • • •"

This provision ignores vested rights and operates retroactively on an unfair basis.

(g) Section 403 (f) provides for delegation, redelegation, and subdelegation and successive redelegations in accordance with regulations prescribed by the President, but the President did not issue any regulations and even if such regulations were issued this provision would be in violation of Article 1, Section 1 of the Constitution.

18. The appellants respectfully submit that similar glaring deviations from and violations of constitutional requisites and standards as are outlined for the enactment of April 28, 1942 are contained in the enactment of October 21, 1942. This enactment for the first time defined "subcontract" and "excessive profits." It did not provide a plan or scheme of administrative procedure.

19. Appellants submit that it is not necessary to exhaust the procedure set forth in Section 403 (e) (1) and (2) of the enactment of February 25, 1944:

(a) The enactment of February 25, 1944, Section 403 (e) (1) provides for a "proceeding *de novo*," but the Tax Court of the United States in Rule 64 which is set forth in an appendix requires an Assignment of Errors. Appellants submit that *de novo* means trial anew and means the same parties and the same issues as in the lower tribunal, and further means that the same burden of proof and the same presumptions of law operate as in the lower tribunal. The Tax Court of the United States by virtue of Rule 64 does not follow the statute, but is in direct violation of the statute; consequently it is proper to seek the aid of equity

when rules or regulations are beyond the statutory scope of the enactments of Congress, *Waite et al. v. Macy et al.* (1918), 246 U. S. 606. The Tax Court of the United States places the burden of proof on the appellants. Furthermore the burden is placed on the appellants to overcome the unilateral determinations of the appellees—these unilateral determinations are claimed by the appellants to have been made under unconstitutional enactments and furthermore to have been made by the appellees in excess of and in deviation from the statutory enactments of April 28, 1942 and October 21, 1942. In the first instance under a fair statutory scheme or plan meeting the requirements of due process of law, the burden of proof should have been met by the appellees.

(b) The procedure set forth by the Tax Court pursuant to Rule 64 places an impossible burden of proof on the appellants which they cannot meet. Pursuant to Rule 64 it is necessary for the appellants to overcome the unilateral determinations.

In the case of *Cohen v. Secretary of War,* Docket No. 27-R, 7 T. C.—No. 118, decided October 22, 1946, the Tax Court said:

> "There is nothing in the statute forbidding expressly or by implication the result thus arrived at by the Rules that the present petitioner has the burden of proof with respect to any amount up to that originally determined as excessive, • • •"
>
> "On the branch of the case which places in issue the excessive character of the $32,000 of profits determined to be such by the Secretary and as to which petitioner has the burden of proof, we must assume in respondent's favor, because petitioner has not succeeded in proving otherwise, • • •"

Section 403 (e) (1) and (2) provides for a *de novo* proceeding. However, the Tax Court starts with the uni-

lateral determination; so appellants submit that in effect the Tax Court is ignoring the *de novo* proceedings required by the staute and that as a consequence it is not necessary to exhaust the administrative remedy provided by Tax Court Rule 64. The Tax Court by virtue of Rule 64 instead of giving appellants a *de novo* proceeding, requires Assignments of Errors. The Assignments of Errors must specify wherein the unilateral determinations are erroneous and where the appellees committed errors. The appellants submit to the Court that the alleged renegotiation conducted by the appellees was conducted in secrecy and in their own bosoms and not conducted by the laws of evidence or within the purview of due process of law from a fair, procedural standpoint; consequently it is impossible to even make valid and fair assignments of errors.

A fair procedure in the Tax Court that would meet the requirements of due process of law would be one whereby the appellants petition the Court. Thereupon the appellees would be obliged in a *de novo* proceeding to set forth their contentions. On these contentions, the appellants would answer and issues would be made. The appellees would be obliged to carry the burden of proof and the appellees would be obliged to carry the burden of going forward that there are excessive profits. Clearly the appellants should not be forced to overcome the unilateral determinations—that is not a proceeding *de novo;* that is merely review. If a proper procedure within the purview of due process had been held in the first instance, assignments of errors as required by the Court still would not be valid.

(c) Any petitioner meeting the requirements of Tax Court Rule 64 (e) must necessarily make a waiver of the jurisdictional question of "coverage"; by doing this the petitioner may be placed in the position of making fatal admissions of acquiescence to the jurisdiction of the Tax

Court which may estop the petitioner subsequently from having the "coverage" question decided in a judicial determination or in a proceeding in a Court to review the administrative hearing in the Tax Court.

(d) The rule of presumption of the validity of administrative action is not applicable in this matter to robe the unilateral determinations with regularity or fairness, for the unilateral determinations spring from action not founded on a statute and emerge by actions of the appellees from statutes not fair on their faces, but saturated with inherent constitutional defects—statutes which do not provide for administrative schemes or plans and are replete with vagueness and uncertainty; consequently the proceedings in the Tax Court must begin anew without the benefit of the presumption of the validity of administrative action.

(e) The burden of proof is not on the appellants, but on the appellees. In the first instance the burden of proof was on the government which it did not carry because of the arbitrary and capricious manner in which the alleged renegotiation was conducted by the appellees. This burden of proof is not shifted in a *de novo* proceeding. The burden of proof is still on the appellees even though the Tax Court has erroneously and unfairly shifted this burden of proof contrary to the due process clause of the Fifth Amendment.

E. Appellees acted in excess of powers, so Skinner & Eddy Corporation v. United States, et al. (1919), 249 U. S. 557 is controlling.

Appellants submit that it is sound constitutional law that when an officer acts in excess of his power or authority, and appellants so claim appellees acted, then it is not necessary to exhaust any administrative remedies, but the aid of the courts may be sought.

In *Skinner & Eddy Corporation v. United States, et al.* (1919), 249 U. S. 557 a bill was filed alleging action in excess of power. The court said on p. 562:

> "The defendants contend that the District Court did not have jurisdiction of the subject-matter of this suit; because orders entered in a fourth section proceeding cannot be assailed in the courts; at least, not until after a remedy has been sought under Sections 13 and 15 of the Act to Regulate Commerce. This contention proceeds apparently upon a misapprehension of plaintiff's position. If plaintiff had sought relief against a rate or practice alleged to be unjust because unreasonably high or discriminatory, the remedy must have been sought primarily by proceedings before the Commission * * * citations * * *, and the finding thereon would have been conclusive, unless there was lack of substantial evidence, some irregularity in the proceedings, or some error in the application of rules of law * * * citations * * *. But plaintiff does not contend that seventy-five cents is an unreasonably high rate or that it is discriminatory or that there was mere error in the action of the Commission. The contention is that the Commission has exceeded its statutory powers; and that, hence, the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if plaintiff has not attempted to secure redress in a proceeding before the Commission. * * * citations

> * * *. The District Court properly assumed jurisdiction of this suit."

The appellants submit that appellees have acted in excess of power and authority in the following respects:

1. Appellants were not within the purview of the enactments.

2. Appellees did not refix any price of any contract that appellants had entered into with their customers.

3. Appellees extended the term "subcontract" from its accepted legal meaning to include appellants.

4. Appellees ignored the provision limiting renegotiation to contracts and subcontracts in excess of $100,000.00.

5. Appellees exceeded the statutes by issuing withholding orders to customers of the appellants.

6. Appellees entered unilateral determinations.

7. Appellants did not have contracts with the United States.

F. Theory for exhausting administrative remedies is not applicable herein.

The reasons underlying the rule providing for exhaustion of administrative remedies is not applicable in the case at bar. The basis of the rule is that administrative questions be determined by agencies rather than by the courts. The reasons for the doctrine were set forth by the court in the case of *Texas & P. R. Company v. Abilene Cotton Oil Company* (1907), 204 U. S. 426:

1. The necessity for a uniform determination of administrative questions such as the question of reasonableness of rates;

2. The matter should be determined by a body of experts.

When these reasons are carried over to "renegotiation," it readily becomes apparent that there was no uniform determination by the appellees on questions of excessive profits and furthermore appellees are not experts possessing the knowledge of all business; knowing what business should do, how business should operate, what costs business incurs and what profits business should realize.

Statutory construction or the scope of Section 403 (e) (1) and (2) does not depend on any administrative questions—it clearly is a legal, judicial question, and it is submitted to the Court that under such circumstances these judicial questions should not be sent to an administrative agency such as the Tax Court for initial decision.

Vom Baur, *Federal Administrative Law* deals with the exhaustion of administrative remedies. In Vol. 1 of this work on page 215, Section 233, Vom Baur devotes a section to the question of when the exhaustion of administrative remedies does not apply. He captions this section *When Rule Does Not Apply:*

> "The rule requiring exhaustion of administrative remedies does not apply where a prescribed administrative remedy fails to comply with the requirements of procedural due process, for resort to such a remedy would be impractical and futile."

The operative effect of the withholding orders or directives has not been suspended by virtue of the filing of the petitions in the Tax Court of the United States. There is ample authority that under these circumstances immediate resort may be had to the Court;

> *United States v. Abilene & Southern Railway* (1924), 265 U. S. 274, 282.

Pacific Telephone and Telegraph Co. v. Kuykendall (1924), 265 U. S. 196;
Porter v. Investors Syndicate (1932), 286 U. S. 461, 470;
Beaumont & Sour Lake & Western Railway Co. v. United States (1930), 282 U. S. 74, 87.

III.

THE REMEDY AT LAW IS INADEQUATE

The appellants in their complaint filed with the District Court averred irreparable injury. This irreparable injury stands admitted by the appellees by virtue of the Motion to Dismiss and the Motion for Summary Judgment filed by them. The allegations of irreparable injury were further substantiated by the testimony of witnesses for the appellants before the Three-Judge Statutory Court on the appellants' Motion for Interlocutory Injunction seeking to restrain the appellees from doing any further acts or taking any further steps whatsoever pertaining to the renegotiation of the appellants and restraining the appellees from continuing in effect and issuing additional withholding orders to the customers of the appellants (Transcript of proceedings, pages 60-64, 67-70, 72, 81 and 82).

Withholding orders or directives have been issued to the customers of the appellants by the appellees in the amount of $445,000.00. Before any sums of money whatsoever were taken by the appellees from the customers of the appellants, appellants filed a complaint in the District Court and also filed a Motion for Interlocutory Injunction. At that time the appellees definitely knew that the appellants were going to litigate the question whether or not the appellees by virtue of withholding orders could take the appellants' property. Nevertheless the appellees did not make any

attempt to maintain the *status quo*, but took from the customers of the appellants $2,478.56 and put it beyond any possible future command of the appellants. Now the appellees are arguing that since they have put this money beyond the future command of the appellants, equity does not have jurisdiction because they are now no longer going to issue withholding orders or interfere or threaten the appellants in reference to the renegotiation proceedings for 1942. When appellees received notice of appellants' complaint and Motion for Interlocutory Injunction, the *status quo* should have been maintained.

Cf. *Jones v. Securities & Exchange Commission* (1936), 298 U. S. 1.

The appellees contend that the testimony of appellants' witnesses was to the effect that the withholding orders in the sum of $445,000.00 did not interfere with or affect the business of the appellants—the transcript of proceedings show otherwise. The witnesses of the appellants testified that a sum of about $3,000 seized and taken from the appellants did not affect their business. Actually the appellees had placed $2,478.56 beyond the command of the appellants —this small sum of money has not affected the business of the appellants and the appellants have not so contended; the appellants do contend that withholding orders in the sum of $445,000.00 forced them to consider whether or not to continue operations, for if they shipped tools, dies, jigs, or fixtures to their customers, they would not be paid for it. If they did not ship tools, dies, jigs, and fixtures to their customers, they would lose their customers. So in any event whichever way the appellants moved, the appellants were being interfered with in the operation of their business. While only the year 1942 is before this Court at this time, the appellants have filed a complaint in the District Court of the United States for the District of Columbia,

Civil Action No. 30089 involving the alleged renegotiation for the year 1943 and involving the issuance of withholding orders by the appellees in amount of $360,000.00. Thus far by virtue of those withholding orders the appellees have taken from the appellants' customers a sum of not less than $75,210.00. This sum of money is now beyond the recovery of the appellants.

All of the appellants' contracts with their customers for both 1942 and 1943 were paid by the customers long before the appellees issued withholding directives for 1942 and for 1943. Actually the appellees are seizing sums due to appellants on contracts entered into in 1944, 1945, and 1946 with their customers.

The remedy at law is inadequate for the following reasons:

1. The appellants cannot maintain an action in the Court of Claims against the United States for sums of money taken by the appellees and placed into the Treasury of the United States. There is no privity of contract with the United States; the appellants have contracts with their own customers and this does not found an action against the United States, *United States v. Blair* (1944), 321 U. S. 730. The sums of money now taken from the appellants cannot be recovered by the appellants no matter what the ultimate determination of a Court operating within the purview of Article 3, Sections 1 and 2 of the Constitution on the alleged renegotiation of the appellants by the appellees.

2. The appellants cannot maintain an action against the United States in the District Court under the Tucker Act for the reason that it does not come within the purview of that act and furthermore even if the appellants were within the purview of the act, the jurisdiction would be wholly inadequate since it is limited to a sum of $10,000.00.

3. The appellants submit that while they may have an action at law against the appellees for damages that the amounts involved are such that the appellees will not be able to respond in damages.

4. The appellants should not be obliged to sit by and wait until an action at law is started against the appellants by the United States in an effort to create a legal enforceable indebtedness. There is no legal and adequate remedy to the appellants if at the time they can raise the constitutional questions and the legal questions involved, the appellees have put appellants' property beyond the reach of appellants by means of withholding orders and placing the property so seized in the Treasury. Furthermore in the event such an action is started, there is no way of ascertaining at this time whether all of the issues will be considered and just what the issues will be. In the meanwhile, additional withholding orders can be issued by the appellees and further sums may be taken from the appellants' property. The starting of litigation against the appellants in the District Court would not eliminate the threat to issue further withholding orders and at any time the appellees could issue such orders to the customers of the appellants. Furthermore, in order for the appellants to have an adequate legal remedy it means that the appellants must be the ones that are able to assert it rather than wait for action taken by an opponent.

5. Appellants should not be forced to sue their customers; such litigation is not clear, practical, or efficient and will entail the loss of the customer and will create bad will in the trade, and in addition the appellants would be obliged to institute a multiplicity of actions. There is no way of knowing just what the issues would be in such actions or what the defenses would be. The appellants should not be put to the expense of suing each customer and not being

able to have a determination in the suit or suits of the entire matter in dispute which incidentally does not involve the customer, but a third party entirely.

6. The appellants cannot sue the United States because the government is immune from suit.

7. If the appellants are obliged to sue their customers, which will entail the loss of the customer, there is a grave question whether all the issues can be settled—it is doubtful whether the appellants will be able to determine the amount of excessive profits in actions at law. Consequently the appellants must litigate in two places under the appellees' contention; at law to sue the customers and in the Tax Court to determine the amount of excessive profits. The matter is more complex and circuitous than this—for by virtue of Section 3806 of the Internal Revenue Code the appellants are entitled to a tax credit. This provision is specifically set forth in the enactment of October 21, 1942. Therefore, the Under-Secretary of War cannot within the purview of the enactment of October 21, 1942 nor can the Tax Court of the United States determine the amount of excessive profits unless and until the tax credit also is determined, but appellants and appellees do not agree on the amount of the tax credit and since this action has started, the Bureau of Internal Revenue has made an examination and proposes to disallow the partnership herein.

8. The appellees contend that there is a legal remedy for the appellants to pursue, but the appellees themselves proceed by withholding orders or directives issued to the customers of the appellants, and seize and take the property of the appellants by virtue of these withholding orders. Consequently there is no legal procedure whatsoever that can avail the appellants when their property is being threatened and being seized, taken and placed beyond their control or command so that appellants can never get it

back. If the appellees had merely made an advisory determination and if the appellees could not enforce that advisory determination, then the rule stated in *California v. Latimer* (1938), 305 U. S. 255 would apply: namely, there is an adequate remedy at law if the enforcement can only be obtained by the appellees through an action of a court of law.

9. Appellees by virtue of the withholding orders issued and directed to the customers of appellants are enforcing their *ex parte,* summary determination without any regard to the proceedings in the Tax Court with the result that a determination by the Tax Court may be such that the appellants are not within the purview of the so-called Renegotiation Acts effective April 28, 1942 or October 21, 1942; or if within the purview, that there are no excessive profits; then in that event the appellants will not be able to get back their money seized and taken by virtue of the withholding orders.

10. The Tax Court remedy does not provide an adequate remedy at law since the Tax Court is not a Court, but is an administrative tribunal, *Petroleum Exploration Inc. v. Public Service Commission, et al.* (1938), 304 U. S. 209.

A. Equity will restrain even though a law stating that no injunction shall issue.

There is a line of cases in which equity allowed an injunction to issue even though it was expressly provided by statute that no injunction should issue. This Court has allowed an injunction to issue on the ground that there was no plain, adequate, and complete remedy at law.

Miller v. Standard Nut Margarine Company (1932), 284 U. S. 498, 509;
Allen v. Regents (1938), 304 U. S. 439, 449.

B. The requisites of equity jurisdiction are present.

The action of the appellees herein in making the unilateral determinations against the appellants and issuing withholding orders or directives to the customers of the appellants pursuant to said unilateral determinations deprives said appellants of property rights. The appellees have made an invasion of appellants' property rights which equity jurisdiction will protect.

> *Tennessee Electric Power Company et al. v. Tennessee Valley Authority, et al.* (1929), 306 U. S. 118, 137;
>
> *Alabama Power Company v. Ickes* (1938), 302 U. S. 464, 479.

The invasion of the appellants' property rights by the appellees has caused irreparable injury, loss, and damage. The issuance of these withholding orders and directives has directly caused the loss of customers of the appellants. There has been a disturbance of the customer relationship and the creation of ill-will in the customer relationship. *Cf. Petroleum Exploration Inc. v. Public Service Commission, et al.* (1938), 304 U. S. 209.

The appellees rely on and submit to the Court the case of *Coffman v. Breeze Corporation, Inc., et al.* (1945), 323 U. S. 316. This case is readily distinguishable from the matter at bar. There the statutes specifically provided that a suit could be maintained against the United States, but the enactments of April 28, 1942 and of October 21, 1942 do not provide or authorize the appellants to bring suit against the United States.

IV.

THIS SUIT IS NOT ONE AGAINST UNITED STATES

The appellees rely on the case of the *Mine Safety Appliances Company v. Forrestal* (1945), 326 U. S. 371. Appellees contend that this case is controlling in the matter at bar. In the *Mine Safety Appliances* case the company had contracts with the United States and the United States withheld the payment of $1,050,000.00; the company did not make a claim that the defendant Forrestal was interfering with the contractual relationship existing between the company and its customers. In the matter at bar, the appellants contend that the appellees are interfering with the contractual relationship existing between the appellants and the customers of the appellants. The appellants did not have contracts with the United States and are not seeking to have any sums paid for any contracts by the United States. The appellants are seeking to restrain the appellees from taking its property from appellants' customers by means of withholding orders. The appellees know that appellants cannot recover back money that has been committed by the appellees to the Treasury of the United States, for the appellants have no standing to sue the United States. Nevertheless while the appellees knew that, the appellees placed appellants' money and property beyond appellants' reach by placing it in the Treasury and the appellees did this after the complaint herein was filed and after the Motion for Interlocutory Injunction herein was filed. Now, after the appellees have done this act, the appellees contend that this Court has no jurisdiction because they will no longer issue withholding orders and that they have taken all that they can take under the withholding orders issued thus far in this case.

When the complaint was filed by the appellants and when the Motion for Interlocutory Injunction was filed by

the appellants, the appellees had not yet taken the appellants' property or money. The appellants sought in the complaint filed in the District Court to challenge the unconstitutional character of the enactments of April 28, 1942 and October 21, 1942 and also the unlawful administrative action exceeding that authorized under the enactments of April 28, 1942 and October 21, 1942.

The appellants in filing the complaint herein relied on the case of *Philadelphia Company v. Stimson* (1911), 223 U. S. 605, 619-620:

> "If the conduct of the defendant constitutes an unwarrantable interference with the property of the complainant, its resort to equity for protection is not to be defeated upon the grounds that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. • • • And in case of an injury threatened by his illegal action, the officer cannot claim immunity from the injunction process. The principle has frequently been applied with respect to State officers seeking to enforce unconstitutional enactments. • • • And it is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred. • • • The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States."

This case was approved by the Court in the *Mine Safety Appliances* case, *supra.*

Cf. Ickes v. Fox (1937), 300 U. S. 82, 97.

The appellants submit that the United States is not an indispensable party to these proceedings. The suit does not seek relief from the United States, but seeks to enjoin

the appellees from their illegal action in seizing and in taking appellants' property by means of withholding orders. This complaint does not seek payment from the government treasury, but on the contrary seeks to stop the activities of the appellees— to stop the appellees from taking appellants' property and putting it beyond appellants' command or control. The Court can determine this matter without the presence of the United States since the United States has no concern with the contracts that appellants have with their customers. As hereinbefore stated all appellants' contracts with their customers for the year 1942 had been paid by the customers long before appellees issued withholding directives to the customers; so the appellees illegally seized sums under current contracts.

The appellants submit that the complaint shows a justiciable interest, *Tennessee Electric Power Company, et al. v. Tennessee Valley Authority, et al.* (1929), 306 U. S. 118, 137:

> "The appellants invoke the doctrine that one threatened with direct and special injury by the act of an agent of the government which, but for its statutory authority for its performance, would be a violation of his legal rights, may challenge the validity of the statute in a suit against the agent. The principle is without application unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."

The appellees are the proper parties defendant and suit has been properly brought against them, *Ex parte Young* (1908), 209 U. S. 123, 159:

> "The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the

State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."

CONCLUSION

It is respectfully submitted:

1. That this case is not governed by the *Aircraft & Diesel Equipment Corp. v. Hirsch,* No. 95, this term and that whatever the Court does with the *Aircraft and Diesel* case should not affect the Court's consideration of the matter at bar.

2. That the appeal herein should not be dismissed, and that the order of the Three-Judge Statutory Court should not be affirmed since appellants do not have an adequate remedy at law and need not resort or exhaust the administrative remedy provided by the enactment of February 25, 1944, and since this suit is properly brought against the appellees.

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APPENDIX

"Rule 64. *Renegotiation of war contracts cases.*—1. Except as otherwise prescribed by this Rule, proceedings for the redetermination of excessive profits under the Renegotiation Act shall be governed by the existing Rules of Practice before this Court. Where any of the existing Rules or the matter contained in the Appendix thereto refer to the Commissioner, such Rules and the matter in the Appendix, when applied to a proceeding for the redetermination of excessive profits under the Renegotiation Act, shall refer to the War Contracts Price Adjustment Board or to the Secretary as defined and used in that Act. Similarly references to the taxpayer shall refer to the contractor or subcontractor; references to tax shall refer to profits under a contract or subcontract subject to renegotiation, or to excessive profits thereunder, dependent upon context; and references to the determination of a deficiency, or a notice of such determination, shall refer to the order of the Board or the Secretary determining the amount of excessive profits.

II. A proceeding for the redetermination of excessive profits under the Renegotiation Act shall be initiated by the filing of a petition, as provided in Rules 4, 5, 7, and 8. (See Form No. 2, Appendix 1.)

In proceedings initiated under section 403 (e) (1) of the Act, the War Contracts Price Adjustment Board shall be shown as the respondent. In proceedings initiated under section 403 (e) (2) of the Act, the Secretary as referred to in that section shall be shown as the respondent.

The petition shall be complete in itself so as fully to state the issues. It shall contain:

(a) A caption in the following form:

THE TAX COURT OF THE UNITED STATES

....., Petitioner, v. ....., Respondent.	Docket No.

(b) Proper allegations showing jurisdiction in the Court.

(c) A statement of the amount of excessive profits determined by the Board or the Secretary, as the case may be, the period for which determined and the amount thereof in controversy. If the determination of excessive profits was made on the basis of a specific contract or contracts, the petition shall identify the contract or contracts and shall state the period covered thereby.

(d) Clear and concise assignments of each and every error which the petitioner alleges to have been committed by the Board or the Secretary in the determination of excessive profits. Each assignment of error shall be numbered.

(e) Clear and concise numbered statements of the facts upon which the petitioner relies as sustaining the assignments of error. The allegations of fact shall contain a statement of the amount received or accrued during the period in question under the contracts or subcontracts subject to renegotiation, the costs paid or incurred with respect thereto and the profits derived therefrom, the type and character of business done, and any other facts pertinent to a determination of the errors alleged.

(f) A prayer, setting forth relief sought by the petitioner.

(g) The signature of the petitioner or that of his counsel. (See Rule 4.)

(h) A verification by the petitioner in accordance with the applicable provision of subsection (h) of Rule 6.

(i) A copy of the notice by the Board, and a copy of the order of the Board, or of its delegates, as the case may be, determining the amount of excessive profits, which notice and order form the basis for the initiation of the proceeding under Section 403 (e) (1) of the Act, or a copy of the order by the Secretary determining the amount of excessive profits, which order forms the basis for the initiation of the proceedings under Section 403 (e) (2) of the Act, shall be appended to the petition. If a statement has been furnished to the petitioner by the Board or the Secretary setting forth the facts upon which the determination of excessive profits was based and the reasons for such determination, a copy of such statement shall also be appended to the petition.

III. Any Claim for the redetermination of an amount of excessive profits greater than the amount shown in the notice of determination shall be made by the respondent in his answer filed under Rule 14, or in an amendment thereto filed under Rule 17 at or before the time of the hearing.

IV. With respect to the matter covered by Rule 60, attention is directed to section 403 (e) (1) of the Renegotiation Act. (Added March 28, 1944, and amended July 10, 1945.)"